Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering comparative analysis from top ranked lawyers

Corporate M&A

Second Edition

Indonesia
SSEK Legal Consultants

chambers.com

2019

Law and Practice

Contributed by SSEK Legal Consultants

Contents

SSEK Legal Consultants has a corporate M&A practice with 30 lawyers, including five partners and three foreign legal advisers. There are 20 members in the labour and employment practice, advising on employment-related aspects of M&A transactions (employee notifications, employee lay-offs, compensation packages, transfers, etc). The primary practice areas which relate to the M&A sector are automotive, banking and finance, consumer goods and retail, energy and natural resources (mining, oil and gas, private power, renewable energy), healthcare, hotels and tourism, insurance, real estate, shipping and maritime, and TMT. SSEK's competition lawyers advise on competition and anti-monopoly law in connection with M&A transactions. SSEK is known for advising clients on complex regulatory issues with sophisticated and innovative legal solutions to the unique issues they face in Indonesia.

Authors

Ira A. Eddymurthy is a founding partner of SSEK and a supervising partner of SSEK's corporate M&A practice. She practises in the areas of corporate law, M&A, foreign investment, banking and finance and insurance. Ira is acting chairwoman of the Commercial Law and Practice Commission of the International Chamber of Commerce (ICC) in Indonesia.

Fahrul S. Yusuf is a partner of the firm and a supervising partner of SSEK's corporate M&A practice. He practises in the areas of corporate law, M&A, antitrust/competition law, labour and employment, IT and technology. He was awarded his LLM from the University of Chicago in 2010. Fahrul is registered with the Capital Market and Financial Institutions Supervisory Board (Bapepam-LK, now the Financial Services Authority, or OJK) as a securities attorney.

1. Trends

1.1 M&A Market

2018 proved to be an improvement on what had been a sluggish 2017. Indonesia saw numerous deals, both domestic and cross-border, across many sectors, including those of industry, energy and finance. There were also some government-initiated projects, eg, the acquisition of PGN, the government-owned national gas company by another government-owned entity, Pertamina, which closed at the end of 2018. Indonesia's improved GDP seemed to maintain foreign interest, especially with the country continuing to move up the ease of doing business rankings.

1.2 Key Trends

We have seen a significant increase in domestic companies pursuing opportunities with local deals, especially in the technology and finance markets. While private equity and venture capital firms continued to be very much active in pursuing investments, there were also a significant number of them who pursued rewarding exit strategies or otherwise identified strategic investors to replace them.

1.3 Key Industries

With the continued growth in e-commerce activities around Indonesia, and both the government and industry players advocating for greater financial inclusion, there has been a spike of interest by technology companies in the finance industry, including multi-finance, peer-to-peer (P2P) and payment solutions. Banking remained a favourite industry for many foreign investors throughout 2018, despite the rigourous procedures and requirements imposed by the Indonesian government for investors acquiring a bank.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Purchasing shares in the company, either from a selling shareholder or from the company itself, is the most common type of share acquisition in Indonesia. Asset acquisitions are also becoming more common for individuals acquiring business units.

Other methods include mergers or amalgamations, where the target company may be dissolved into the surviving company and will therefore no longer exist.

2.2 Primary Regulators

Depending on the sector in which the target company is engaged, any change of shareholding composition resulting from either a merger or acquisition must be approved or acknowledged by the Ministry of Law and Human Rights. The Ministry is the department that oversees all limited liability companies, no matter the sector, non-public or public alike.

If a foreign party wishes to acquire shares in an Indonesian company, generally, for most industries, an approval from the Investment Co-ordinating Board (*Badan Koordinasi*

Penanaman Modal – BKPM) is required. Other industries, especially if they are heavily regulated, eg, banking, finance, and telecommunications, are under specific government agencies, such as the Financial Services Authority (*Otoritas Jasa Keuangan* – OJK), Bank Indonesia or the Ministry of Communication and Informatics.

The OJK has supervisory authority for the takeover of public companies and if the public company is listed at the Indonesia stock exchange (being the only stock exchange in Indonesia), the IDX's listing and trading rules will also apply, particularly when there is trading activity due to the M&A activity.

It is possible that multiple regulators will supervise a transaction if the target company's status and core business require it. For example, for the acquisition of a public company engaged in the telecommunications sector, both the OJK and the Ministry of Communication and Information Technology will play a supervisory role. Other government agencies may have regulatory oversight of a particular transaction, depending on the business in which the public company engages. For example, the Ministry of Transportation supervises the aviation, shipping and land transportation sectors. Regulations issued by these and other industry-specific government agencies will impact mergers and acquisitions.

2.3 Restrictions on Foreign Investments

There are various limitations to foreign direct investment in various sectors in Indonesia, which can be found in the general 'negative investment list' issued from time to time by the President or in a specific law or regulation related to a specific sector such as banking, finance, aviation or payment systems, to name a few. Some sectors are completely closed to foreign ownership, but many sectors (eg, manufacturing, IT service and management consultancy) are open for 100% foreign investment.

2.4 Antitrust Regulations

Post-merger notification is mandatory for any merger, consolidation or acquisition of shares between non-affiliated companies that:

- causes a change in control: and
- meets the Indonesian assets or sales thresholds (as set out below).

The qualifying transaction must be reported to the Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha*) within 30 working days as of the effective date of the relevant merger, consolidation or acquisition.

There are two applicable thresholds to assess whether a transaction is subject to the merger report:

- the combined value of the companies' assets in Indonesia exceeds IDR2.5 trillion (IDR20 trillion for banks); or
- the combined turnover in Indonesia exceeds IDR5 trillion.

Merger, consolidation or acquisition of shares transactions conducted between affiliated parties are exempt from the mandatory post-merger notification. Parties are considered affiliated if one controls the other (whether directly or indirectly) or if the same entity controls them. Mergers, consolidations or acquisitions of shares between companies that are controlled by the Government (ie, state-owned enterprises) do not qualify for this exemption.

2.5 Labour Law Regulations

The Indonesian Labour Law (Law No 13 of 2003) allows an employee to resign due to a 'change of ownership' of the employer entity and receive enhanced separation entitlements. Another issue concerning labour entitlements due to a change of ownership is the impact on the purchase and sale transaction. Labour entitlement payments can be costly, especially where there are many long-service employees.

2.6 National Security Review

There is no national security review mechanism for commercial mergers or acquisitions in Indonesia.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

In June 2018, the Government introduced the Online Single Submission (OSS) system, an integrated online application system created to accommodate the process of obtaining business licences and permits, including those related to mergers and acquisitions. Before June 2018, the BKPM issued business licences and permits for foreign investment companies that had customarily been a condition-precedent item to closing a transaction. With the OSS system, the permits and licences will need to become a condition-subsequent and generally no longer be the responsibility of the seller or vendor.

While the intention of the OSS is to simplify all licensing processes, there remains a post-audit risk, ie, an audit by the BKPM, which still has the authority to supervise foreign investment companies. Otherwise, the relevant ministries for compliance will be conducted post-transaction, after the target company completes the online submission. Investors are expected to be aware of the applicable regulatory regime to make sure that compliance with applicable laws and regulations is maintained to minimise any post-audit risks that may ultimately affect their investment in the target company.

3.2 Significant Changes to Takeover Law

For a long time, strategic investors have been hesitant about acquiring a significant stake in Indonesian public companies. This is because they would be required to make an offer to buy the shares from the minority shareholders if they were proven to be the new controller of the target company. This requirement used to be waived if the takeover was done through rights subscriptions, but no more.

Before the new public company takeover rules were introduced in July 2018, investors could acquire a controlling stake in a public company without being required to make a mandatory tender offer, if the acquisition were made through the subscription of rights that would then be exercised to become new shares in the public company. The mandatory tender offer requirement would only be required if the shares were purchased from a shareholder in the company. However, the introduction of new rules last year by the OJK no longer exempts takeovers from the mandatory tender-offer requirement through a rights subscription. The requirement can still be avoided if the rights subscription fulfils certain criteria stipulated in the rules.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

If a bidder decides to build a stake in a target, they can do so either through a direct increase in shareholding or by way of derivatives. The former is more common, although the latter is becoming increasingly frequent due to commercial or tax reasons.

4.2 Material Shareholding Disclosure Threshold

In general, the Ministry of Law and Human Rights maintains a registry that includes corporate information on all limited liability companies in Indonesia, including their shareholding information. Any change in shareholding composition will need to be acknowledged by the Ministry and recorded in the registry, which is accessible to the public. A buyer intending to acquire a controlling stake in a non-public company will also need to announce the transaction publicly through nationally circulated newspapers before the buyer and the seller can close the transaction.

A disclosure obligation also arises concerning an interest in securities when an investor reaches 5% of outstanding shares in an Indonesian public company. Once a shareholder reaches the 5% threshold, the shareholder must report to the OJK on any transfer of shares, provided the ownership is still above 5%.

If the shareholding ownership drops below 5%, the shareholder must still report the decrease of ownership (eg, the ownership changing from more than 5% to less than 5%), after which no reporting is necessary for any transfer of shares (provided the ownership remains less than 5%).

Also, rules from the IDX require public companies listed on the IDX to make public any information relating to investors owning 5% or more of the shares in that public company (available on the IDX website). The public companies must make the disclosure no later than ten calendar days after the obligation arises, because there will have been an acquisition or disposition of shares.

The IDX identifies shareholders owning more than 5% of the shares in a public company on its website.

4.3 Hurdles to Stakebuilding

Any increase or change in shareholding in most non-public companies requires shareholder approval. The Company Law (Law No 40 of 2007) sets out the minimum quorum and voting requirements for shareholders' meetings. However, the articles of association can specify higher thresholds, which will prevail over those specified in Indonesian company law.

Obtaining shareholder approval may prove difficult, although not always, particularly if a company consists of many shareholders and a quorum is difficult to reach a decision. Other difficulties may include obtaining the licence or approval from the relevant Government authority for including a foreign element in the shareholding composition, which is particularly true for certain industries such as the payment industry.

Shareholder approval is generally not required for an increase in shareholding in public companies, unless the increase is made through a rights subscription. In general, obtaining approval from the shareholders in a public company is more challenging, not only from a procedural perspective but also in the gathering of the necessary quorum, in which case securing a commitment from the incumbent controller of the company is almost always necessary.

4.4 Dealings in Derivatives

Many acquisition transactions are preceded by an agreement involving derivatives, such as a subscription agreement to convertible or exchangeable bonds, or call/put option agreement. These are allowed under Indonesian law and there are various reasons for pursuing such agreements. The most notable reason is tax efficiency, while another is security (eg, to secure repayment in a loan arrangement).

4.5 Filing/Reporting Obligations

There is no disclosure requirement when the stakebuilding is carried out using derivatives (eg, convertible bonds, call/put options). The post-merger report (as discussed in **2.4 Antitrust Regulations**, above) does not apply either. The disclosure/report obligation will arise only on the exercise/

conversion of the derivatives into shares in the company if the relevant thresholds are met.

4.6 Transparency
As previously mentioned, a buyer intending to acquire a controlling stake in a non-public company will need to announce the transaction publicly through nationally circulated newspapers before the buyer and the seller can close the transaction. However, in general, there is no requirement for the buyer to disclose their intention regarding control of the company.

For heavily regulated industries such as banking, a strategic investor who intends to acquire and control a particular bank must disclose their intention on the direction of the bank's business, going forward, during their fit and proper test to become the controlling shareholder of the bank.

For takeovers of public companies using the Voluntary Tender Offer (VTO) method (as explained in **6. Structuring** below), a bidder must also make known his or her intention for the target company, ie, whether they wish to delist the company from the stock exchange and make it a private company.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal
There is no requirement to disclose a deal when acquiring a non-public company, other than the newspaper announcement mentioned previously.

In terms of public company acquisitions, a prospective controller can announce that it is in negotiations with the seller in a nationally circulated newspaper. This announcement is typically made if the buyer anticipates an increase in the price of the public company's shares, which will affect the minimum price at which the buyer must purchase the shares during any subsequent Mandatory Tender Offer (MTO) process (see further, below).

Once the negotiation process is announced, a 90-day period for determining the MTO price is locked, starting backwards from the date on which the announcement was made. If an announcement is not made, the 90-day period will be calculated backwards from the date of the closing (ie, the date on which the acquisition is effective).

To the extent that the prospective controller decides not to disclose to the public information resulting from the negotiations, the parties involved must keep confidential the information that results from the negotiations.

5.2 Market Practice on Timing
Generally, in practice the timing of disclosure is made according to the requirement prescribed in the law.

5.3 Scope of Due Diligence
There are no specific requirements or procedures for due diligence before acquiring a company. However, it is common and best practice for a bidder to perform due diligence on the target company before proceeding with an acquisition.

In practice, the due diligence will cover the following:

- corporate organisation and general information;
- compliance with general and industry-specific licensing and reporting requirements;
- compliance with reporting requirements;
- assets owned and leased, including real estate;
- borrowings;
- material agreements, including third-party contracts, commitments, and miscellaneous agreements;
- litigation and claims; and
- employees, including key employees.

In the case of public companies, the selling shareholder, being the incumbent controller of the public company, is considered an insider and therefore any sale of shares by that shareholder is subject to applicable rules concerning insiders. The insider rules require any selling shareholder and the buying party to enter into a confidentiality agreement under which the buying party undertakes that any information received (including information from the due diligence process) will be kept confidential and will not be used for any purpose other than a securities transaction with the insider/selling shareholder.

5.4 Standstills or Exclusivity
During the early stage of deals (eg, term-sheet negotiation, due diligence), it is very common that a sole bidder or offeror demands exclusivity, typically lasting for three to six months from the signing of a term sheet or memorandum of understanding.

5.5 Definitive Agreements
In the case of public company acquisitions, a prospective buyer of the shares may agree with the seller on certain terms related to the MTO in the share purchase agreement. It is relatively uncommon, but in certain cases the buyer may need a commitment from the seller to support the buyer in fulfilling his or her sell-down/re-float requirement following the MTO that it conducts after the takeover.

The OJK regulation on public company takeovers requires a re-float obligation that follows a takeover and MTO, which require the new controller to sell down to 80% within two years of the MTO and retain a minimum public float, if the new controller holds shares in excess of 80% of a public company that were acquired through the MTO.

6. Structuring

6.1 Length of Process for Acquisition/Sale

For acquiring/selling non-public or public companies, the process will generally take around three to six months, starting from the term-sheet negotiation stage, continuing with due diligence, share purchase agreement negotiation, conditions fulfilment and closing. The process will generally take twice as long if the acquisition is made through a rights subscription over a public target entity, where a general meeting of shareholders to obtain their approval must be convened.

6.2 Mandatory Offer Threshold

There is no mandatory offer threshold applicable for mergers or acquisitions involving non-public companies.

For public companies, an MTO is generally required following a change of control arising from an acquisition of shares either from an incumbent shareholder or if the change of control arises from the subscription for newly issued shares in a rights offering (unless exempted under certain conditions).

A change of control is generally deemed to occur where either more than 50% of shares in the public company are acquired or, if less than 50%, there is an effective change of control over the management or policy-making in the company.

6.3 Consideration

If the acquisition is by subscription for newly issued shares issued by the non-public target company, the consideration must be either cash or in-kind. In a direct acquisition from an existing shareholder, the consideration can be in the form of cash or shares in another company. Subscription to new rights issued by public companies can only be made in cash.

6.4 Common Conditions for a Takeover Offer

As explained previously, a new controller of a public company is obliged to make an MTO to the remaining minority shareholders, as a result of it acquiring a controlling stake from an existing controller of the public company. In the case of an MTO, conditions for offer are generally as prescribed by law.

Other means of obtaining control include mergers and VTOs. However, given the regulatory and procedural complexities that a merger will entail (particularly when it involves a public company), mergers are quite rare except where they occur for regulatory purposes in the banking and insurance sectors. VTOs are also rare and are more often used by a controlling shareholder to take a public company private and de-list, in addition to acquiring a controlling stake.

6.5 Minimum Acceptance Conditions

There is no minimum acceptance condition for MTOs, since bidders are required to make the offer after they acquire a controlling stake and attain control in the company. In other words, they are required to buy the shares from each of the minority shareholders participating in the offer, which means a minimum acceptance condition is irrelevant.

There may be a minimum requirement in a VTO context, depending on whether the offeror wishes to have the public target de-listed from the stock exchange and make it a private company. If the offeror does wish to do so, the OJK will typically allow the going-private to happen if there are fewer than 50 remaining shareholders.

6.6 Requirement to Obtain Financing

Many buyers in M&A settings require third-party financing to acquire shares in a target company. It is permitted and common for the buyer and seller to agree that the transaction will close only once the buyer has secured proper financing. This is particularly important if the acquisition involves a publicly listed target, in which the buyer may need to make an MTO following the acquisition, which will require the buyer to have the necessary financial capability.

Committed funding is also required before announcing an offer in a VTO context. A party conducting a VTO must submit a statement on the availability of funds to settle the VTO, which must be supported by an opinion from the accountant, bank or securities company involved.

6.7 Types of Deal Security Measures

Deal security measures, such as break fees, are not common in Indonesia, although they are permitted. In smaller deals involving individual local vendors, some will require break fees, which are typically half the cost of lawyers and other related expenses they incurred.

6.8 Additional Governance Rights

A controller does not have to own 100% of a target company to control it. A shareholder owning more than 75% of shares would have the requisite voting power to adopt any corporate actions that are subject to shareholder approval under the Company Law (as discussed in detail below).

In general, resolutions of a general meeting of shareholders (GMS) are adopted by consensus. Failing which, a resolution must be approved by more than one half of the shares in attendance or represented, except for the following corporate actions, which require higher thresholds:

- amendment to the articles of association, which must be approved at a meeting at which at least two thirds of the

company's voting shares are represented and at least two thirds of the shares in attendance approve the resolution; and,
- a merger, consolidation, acquisition, bankruptcy and/ or dissolution of the company, as well as the transfer or pledge of the company's assets as security for a loan that comprise more than 50% of the company's net assets in one or more related or unrelated transactions. This must be approved at a GMS at which at least three fourths of the company's voting shares are represented and at least three fourths of the shares in attendance approve the resolution.

Additional governance rights other than the above can still be agreed between the shareholders in a shareholders' agreement or even in the articles of association, by specifying certain reserved matters on which unanimous approval is required or by creating a class of shares that provide specific rights to certain shareholders.

6.9 Voting by Proxy
In general, under the Indonesian Company Law one share bears one vote and each share is issued under the name of its holder. The Company Law does not allow the issue of bearer shares.

Despite the above, it is possible for a shareholder to give proxy to another party to attend a shareholders' meeting and cast his or her vote on the shareholder's behalf.

6.10 Squeeze-out Mechanisms
The OJK as of this writing has never issued clear-cut guidelines for acquiring an Indonesian publicly listed company and then de-listing it and taking it private. The OJK normally issues a 'letter' to the prospective controller specifying the procedures and requirements on a case-by-case basis.

In general, the de-listing itself requires GMS approval and the OJK's 'no objection' toward a Tender Offer Statement being submitted by the company.

In the most recent examples, the OJK has also required that the going private:

- is approved by independent shareholders (simple majority vote, attended by more than 75% of independent shareholders with voting rights); and
- follows the procedures of a VTO towards all the shares in the public company, be it the founding shares or the public shares.

The de-listing and the going-private are only effective once the aforementioned requirements have been fulfilled and the total number of the company's shareholders is fewer than 50 parties.

It is expected that all public shareholders would sell their shares during the one-month tender offer period at the price offered by the prospective buyer. In general, the price for the tender offer is required to be higher than the average of the highest daily trading price at the stock exchange for the last 90 days before the tender offer announcement is made. Once the tender offer process has been concluded and it results in the total number of shareholders dropping below 50, the company may proceed to change its status to a private company.

If the target of having fewer than 50 shareholders is not achieved, the company may not proceed with going private and the tender offer process may need to be repeated, subject to a ruling by the OJK, and this may involve an increase in the offering price. The process can be tricky and may come down to chasing individual shareholders to convince them to 'participate' in the tender offer process.

Once the going-private becomes effective any shareholders who did not participate in the tender offer process will remain as shareholders of company. To fulfil the requirement of the Company Law, Article 62, which essentially gives shareholders the right to have their shares bought by the company if they think they are suffering losses due to a certain corporate action of the company, any shareholders who did not approve the going-private may request the company to buy their shares at a fair price (as determined by an appointed independent appraiser) and the company is required to do so.

6.11 Irrevocable Commitments
When negotiating or signing a conditional share purchase agreement it is permissible and common to secure a commitment from the incumbent controller of the target company, especially if the transaction requires approval from shareholders and securing the minimum affirmative votes to close the deal.

7. Disclosure

7.1 Making a Bid Public
A bid is made public in the case of either an MTO, which follows a change of control, or a VTO. Before the offeror can proceed with either, he or she must announce an intention to the public. The announcement must be reviewed by the OJK before it is released. The offeror can only proceed with the MTO or VTO after the OJK states that it has no objection to the tender offer statement.

7.2 Type of Disclosure Required
In the case of a share acquisition involving a non-public company, generally no disclosure is required other than the newspaper announcement discussed earlier, which contains very basic information concerning the buyer and the target

and the fact that there will be a change of control over the company.

If the share acquisition is made over a public company through the issue of shares, the issue will be subject to shareholder approval through a GMS, which must be preceded by the circulation of a fully fledged prospectus by the target company.

7.3 Producing Financial Statements
There is no requirement for bidders to produce a financial statement, other than the requirement that the bidder has the financial capability. Committed funding is required before announcing an offer. A party conducting a VTO must prepare a statement on the availability of funds to settle the VTO, which must be supported by an opinion from the accountant, bank or securities company involved. In practice, the same also applies to MTOs.

7.4 Transaction Documents
Transaction documents are not required to be disclosed, either in a non-public or public company merger or acquisition. The pricing, however, must be disclosed in an acquisition of a public company, particularly if an MTO is required to be conducted by the new controller following the acquisition. This is because the price to be offered by the new controller in an MTO must not be lower than the price used in acquiring the shares in the initial acquisition.

If a shareholders' agreement is signed when acquiring a public company, it may become necessary to disclose later the key terms of the agreement to the OJK. This is typically the case when the buyer must demonstrate to the OJK that there will be no change of control occurring from the transaction and that an MTO will therefore not be necessary.

8. Duties of Directors

8.1 Principal Directors' Duties
All members of the board of directors of limited liabilities companies in Indonesia, whose primary duty is to carry out the day-to-day operations of the company and to represent the company, must perform their duties in good faith, for the best interest of the company and in accordance with the purposes and objectives of the company as specified in its constitutional documents.

The same also applies to the members of the company's board of commissioners, whose primary duty is to supervise and monitor the directors. The board of directors and board of commissioners make up the two-board system that the Company Law requires, although each has equal status, despite their distinct functionalities. A GMS appoints the members of both boards.

8.2 Special or Ad Hoc Committees
The board of directors can establish a special team or committees to assist it in overseeing the process, including identifying a potential target, drafting transaction documents, co-ordinating with outside advisers, as well as negotiation. Typically, however, the directors themselves make all the final decisions.

The establishment of such special teams is not intended to tackle conflict of interest issues. The Company Law does not allow a director to represent the company, including in an M&A context, if the director has a conflicting interest with that of the company. In this case, other directors in the company must represent the company (if the company's board of directors consists of more than one director). If all directors are conflicted, the board of commissioners can represent the company. If both boards are conflicted, the shareholders can appoint another party to represent the company.

Directors and commissioners of public companies and financing companies must further follow an additional set of rules under capital markets laws, which deal with conflict of interest. Public companies must disclose to the public any transactions by the company that have a conflict of interest element against the interest of any party affiliated with the directors or commissioners of the company. The transaction must be approved first by disinterested shareholders if it transpires that the transaction is considered to be detrimental to the public company or if it is not in the best interest of the company.

8.3 Business Judgement Rule
The business judgement rule, though not formally recognised under Indonesian law as a legal term, provides a concept of immunity that is similar to what is provided under the Company Law. The Company Law, Article 92 gives authority to the board of directors to manage the company according to its good judgement, within the parameters of the Company Law and its constitutional documents. Article 97 further states that a member of the board of directors will not be liable for the losses of the company if it is evident that:

- such losses are not the result of his or her fault or negligence;
- he or she has performed due care in managing the company, with good faith and prudence for the interest of the company according to its purposes and objectives;
- there is no element of conflict of interest, either directly or indirectly, in the management of the corporate action that resulted in the loss; and
- he or she took precautionary measures to avoid the loss or the continuance of it.

While the above seems clear, ie, that all business judgements rendered according to law should provide protection to directors against all liabilities that may arise from any potential business risks, it may not be the case if there is an element of potential loss to the state. A recent case shows that a business decision made by a director of a state-owned enterprise that goes wrong may put the director at risk of being accused of a criminal act. The Attorney General would of course need to prove that there was an intention of wrongdoing before the court could convict the defendant. However, this at least shows that the courts may look beyond the judgement of the board of directors in cases that involve loss to state-owned enterprises.

8.4 Independent Outside Advice

It is almost always the case that the management of companies seeks outside counsel before entering into any definitive agreement for business combinations. Prospective acquirers seek legal counsel for the obvious reason that the transaction is legally feasible and to identify all rights and obligations that the acquirers will assume from the combination, including any legacy liabilities. A financial and tax consultant will also play an important role to help quantify any financial risks, and their findings during the due diligence will often complement those risks identified from the legal end.

In certain transactions involving targets engaged in the natural resources sector, it is also common and advisable to seek the advice of environmental consultants, since environmental issues are often a highly topical in Indonesia. The consultants will be useful in suggesting corrective measures to prevent the recurrence of legacy environmental issues, which if not corrected may lead to imprisonment.

8.5 Conflicts of Interest

Conflicts of interest of directors or shareholders have been the subject of corruption law enforcement, particularly where a potential loss to the state has been identified. The Indonesian Corruption Eradication Commission (KPK) is currently investigating a former district head for allegedly receiving bribes from a company in connection with a regional infrastructure procurement project, in which he was also an indirect controlling shareholder of the company. The case is considered a corporate crime, and as of this writing, there has been only one company that has been found guilty of committing a corruption crime.

The Supreme Court has issued a regulation that sets out procedures for handling corporate crimes. Since its issue there have been a few instances where companies were investigated for possible corporate crimes. The KPK in particular appears to have used the regulation to investigate corporations in connection with corruption cases.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile bids are not recognised in Indonesia. As explained earlier, acquisitions in Indonesia can be performed either through direct acquisition from existing shareholders, or by acquiring newly issued shares directly from the company.

In the case of public companies, almost all public companies in Indonesia have controlling shareholders in place, making hostile takeovers unlikely. Direct acquisitions require the co-operation of the incumbent controlling shareholders for the obvious reason that those controlling shareholders must be willing to sell, while rights offerings also require the support of controlling shareholders for the simple reason that they are subject to the approval of a shareholders meeting, where securing the affirmative vote from these shareholders will be necessary.

9.2 Directors' Use of Defensive Measures

No defensive measures are available for directors, either in the context of non-public or public company acquisitions.

9.3 Common Defensive Measures

In a VTO situation, directors of the public target can make known publicly their objection to the offer. There are no other measures made available by the law other than this. Their announced objection may prove to be sufficiently compelling and the shareholders of the public target may think twice before saying yes to the offeror.

9.4 Directors' Duties

In general, whatever measures directors take, their fiduciary duty for the best interest of the company remains in place, as discussed previously.

9.5 Directors' Ability to 'Just Say No'

Directors cannot just say no or take action that can prevent the acquisition of the company in which they hold office.

10. Litigation

10.1 Frequency of Litigation

Litigation in connection with M&A deals is not common in Indonesia.

10.2 Stage of Deal

If a court dispute does occur it will most likely take place after the transaction documents have been signed, either after or before closing. A breach of contract claim by the buyer might occur if the seller cannot fulfil the warranties or undertakings as agreed in the transaction documents. This should be a sufficient basis for making a filing at a court in Indonesia.

11. Activism

11.1 Shareholder Activism

Shareholder activism is not a defined term not is it recognised under any laws in Indonesia. The Company Law, however, does provide minority shareholders with certain rights. These rights give them the ability to initiate certain actions that are essentially intended to protect themselves against potential losses that might be caused by a company's corporate actions. In a M&A context, for example, each shareholder has the right to request the company to repurchase his or her shares at a reasonable price if a merger, consolidation or acquisition of the company causes the shareholder to suffer losses. Each shareholder is also entitled to file a lawsuit against the company if the shareholder suffers losses caused by any of the company's actions that are considered unfair or unreasonable.

In the realm of public companies, any conflict of interest transactions that may cause loss to the company are subject to prior approval from minority or disinterested shareholders, the approval of which is given through a general meeting of independent shareholders.

11.2 Aims of Activists

The way rights are given to minority shareholders under the Company Law is generally not intended to give them the ability to encourage certain corporate actions of the company. The company must convene a shareholders' meeting at the request of one or more shareholders who jointly represent one tenth of the total number of shares having valid voting rights, but there is no guarantee that the meeting will yield an outcome that the minority shareholders are seeking without securing the votes of the majority shareholders in the company.

11.3 Interference with Completion

The Company Law does not provide any rights to minority shareholders to interfere with transactions, particularly when they are still in the announcement stage, which typically means the shareholders or the board (as applicable) have not approved the transaction. The rights of minority shareholders are triggered only when a corporate action, including those involving M&A transactions, has obtained the requisite corporate approval either at shareholder or board level.

SSEK Legal Consultants

14th Floor, Mayapada Tower I
Jl Jend Sudirman Kav 28
Jakarta 12920
Indonesia

Tel: + 62 21 5212038
Fax: + 62 21 5212039
Email: ssek@ssek.com
Web: www.ssek.com

SSEK
Indonesian Legal Consultants